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October Term, 1995

VICKY M. LOPEZ, ET AL., APPELLANTS

v.

MONTEREY COUNTY, CALIFORNIA, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**BRIEF AMICI CURIAE OF THE AMERICAN CIVIL
LIBERTIES UNION, THE LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW, AND THE
NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC. IN SUPPORT OF APPELLANTS**

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INTEREST OF THE AMICI CURIAE^{1/}

The American Civil Liberties Union (the "ACLU"), the Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") and the NAACP Legal Defense and Educational Fund, Inc. (the "Fund") submit this brief as *amici curiae*, with the consent of the parties, in support of appellants' argument that the three-judge district court erred in lifting its injunction against Monterey County's implementation of an unprecleared, at-large voting plan for the election of municipal judges and in refusing to extend an interim district-based plan that secured minority voting rights. Protection of the voting rights of minorities is an important aspect of the ACLU's, the Lawyers' Committee's, and the Fund's work, as demonstrated by their frequent appearances before this Court in various voting rights cases since the adoption of the Voting Rights Act in 1965.

The ACLU is a nationwide, non-profit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the equal right of racial and other minorities to participate in the electoral process. Specifically, the ACLU has provided legal representation to minorities in numerous jurisdictions throughout the country and has frequently participated in voting rights cases before this Court, both as direct counsel, *see, e.g., Miller v. Johnson*, 115 S. Ct. 2475 (1995); *Holder v. Hall*, 114 S. Ct. 2581 (1994); *McCain v. Lybrand*, 465 U.S. 236 (1984); *Rogers v. Lodge*, 458 U.S. 613 (1982), and as *amicus curiae*, *see, e.g., United States v. Hays*, 115 S. Ct. 2431 (1995); *Davis v. Bandemer*, 478 U.S. 109 (1986).

The Lawyers' Committee was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Lawyers' Committee has frequently represented African-American citizens in voting rights cases before this Court, *see,*

^{1/} Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to rule 37.3.

e.g., *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); *Connor v. Finch*, 431 U.S. 407 (1977), and has appeared as *amicus curiae* in other significant voting rights cases in this Court, see, e.g., *Shaw v. Reno*, 113 S. Ct. 216 (1993); *Miller*, *supra*. The Lawyers' Committee has a particular interest in this case because it involves the continued enforcement of the doctrines set forth in *Clark v. Roemer*, 500 U.S. 646 (1991), and *Connor v. Finch*, 431 U.S. 407 (1977), cases that it litigated.²⁷

The Fund is a non-profit corporation that was established for the purpose of assisting African Americans in securing their constitutional and civil rights. This Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). The Fund has participated in many of the significant constitutional and statutory voting rights cases in this Court. See, e.g., *United Jewish Org. v. Carey*, 430 U.S. 144 (1977); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers Assoc. v. Attorney General of Texas*, 501 U.S. 419 (1991); *Shaw*, *supra*; *Miller*, *supra*.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This case involves the appeal of a three-judge district court's order that is totally at odds with Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Section 5 requires that, with respect to covered jurisdictions, the Attorney General or the United States District Court for the District of Columbia preclear any changes affecting voting prior to their implementation. *Id.* *Amici curiae* fully agree with appellants that the three-judge district court (the "district court") radically subverted Section 5's mandate when

²⁷ The Lawyers' Committee for Civil Rights of the San Francisco Bay Area, co-counsel to appellants in this action, is a separate entity from the national Lawyers' Committee for Civil Rights Under Law. Although they are affiliates, the two organizations are separately incorporated and independently operated and governed.

it dissolved an injunction that had prohibited Monterey County, a covered jurisdiction, from implementing an unprecleared, at-large voting plan for the election of municipal judges in the County. See *Clark v. Roemer*, 500 U.S. 646, 652-54 (1991) (requiring that courts enjoin the implementation of covered, unprecleared voting changes absent "extreme" circumstances). The district court's error was compounded by the fact that, prior to its order, Monterey County had sought to obtain preclearance for the plan from the District Court of the District of Columbia but abandoned that effort, stipulating that it was "unable to establish that [the at-large plan] . . . did not have the effect of denying the right to vote to Latinos in Monterey County due to [its] retrogressive effect" (J.A. 126) The district court thus sanctioned the use not only of an unprecleared election plan but one for which Monterey County had stipulated it could not obtain preclearance.

We understand that appellants will fully address the district court's error in dissolving its injunction against Monterey County's implementation of the unprecleared plan and its violation of the standards set forth in *Clark v. Roemer*, *supra*. This brief of *amici curiae* focuses on another egregious error: the district court's unwarranted refusal to extend an interim plan, already in place, that includes two majority-Latino districts and remedies the County's violation of the Voting Rights Act.

The district court failed to meet its remedial obligation because of its fundamental misreading of this Court's decision in *Miller v. Johnson*, 115 S. Ct. 2475 (1995). The district court read *Miller* to constrain a court's authority to remedy a Section 5 violation by implementing any plan that includes majority-minority districts, if race was a "significant factor" in the plan. As a result, the district court departed from well-settled federal law requiring that court-ordered plans be district-based and abdicated its obligation to devise an interim plan that would not cause the retrogression of Latino voting strength. Instead, the district court sanctioned the implementation of the unprecleared at-large plan that the County acknowledged it could not show to be non-retrogressive. (Motion to Dismiss or Affirm of Intervenor Stephen A. Sillman ("Sillman Motion") App. 4a; see J.A. 126)

Nothing in *Miller* justified this perverse result. Race, of course, will be a "significant factor" in *any* plan designed to remedy a violation of Section 5 and to assure adequate protection of a minority group's voting rights. *Miller* held only that a districting plan based "predominantly" on race was subject to strict scrutiny, and even then, that it would be lawful if narrowly tailored to meet a compelling state interest. Moreover, under *Miller*, race will not be deemed the predominant purpose behind a plan absent proof that the plan disregards traditional redistricting principles. In refusing to extend the interim plan, the district court did not attempt to make findings on any of these matters. Indeed, even its conclusion that race was a "significant factor" in the design of the interim plan was reached without holding any evidentiary hearing.

These circumstances require reversal of the district court and make it imperative that this Court clarify that *Miller* is not an obstacle to a lower court's obligation, where it has found a violation of the Voting Rights Act, to implement a properly drawn, district-based remedial plan that protects minority voting rights.

Finally, the district court erroneously believed that a federal court was forbidden from fashioning an appropriate district-based remedial plan if it involved any departure from *state law*. This Court should re-affirm its decision in *Conner v. Finch*, 431 U.S. 407 (1977), that, while a court should be aware of—and attempt to comply with—state law and policies to the extent possible in crafting a remedial plan, state law cannot be an absolute barrier to the effective enforcement of the Voting Rights Act.

The Proceedings Below

On September 6, 1991, appellants filed this action against Monterey County, seeking to enjoin the use of an at-large voting plan for the election of the County's municipal judges. (J.A. 27-35)² Appellants alleged that the County, which is subject to the

² Subsequently, the State of California was joined as a necessary party defendant and the Honorable Stephen A. Sillman, Presiding Judge of the
(continued...)

provisions of Section 5 of the Voting Rights Act, *see* 28 C.F.R. 51.4 and App., had failed to obtain preclearance for the ordinances, enacted after November 1, 1968, which established the plan. (J.A. 29-31)⁴

On March 31, 1993, the three-judge district court held that Monterey County had implemented the at-large plan in violation of Section 5 and enjoined its use pending preclearance by either the Attorney General or the United States District Court for the District of Columbia. (J.A. 58-59) On August 10, 1993, the County filed an action in the United States District Court for the District of Columbia, seeking the necessary declaration that the plan was not discriminatory. (J.A. 125-26) Eight months later, however, the County dismissed the action, stipulating:

The Board of Supervisors is unable to establish that the Municipal Court Judicial Court Consolidation Ordinances adopted by the County between 1968 and 1983 did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County.

(Sillman Motion App. 4a; *see* J.A. 126)

Subsequently, on December 20, 1994, the court accepted the parties' joint proposal that it implement a special election plan as an interim remedy and ordered that Monterey County hold

³ (...continued)

Monterey County Municipal Court, was joined as a defendant-intervenor. (J.A. 161)

⁴ As of November 1, 1968, Monterey County had four municipal court judges, elected from two districts, and seven justice court judges, each elected from a separate district. The post-November 1, 1968 ordinances created a consolidated system in which ten municipal judges were elected at-large from the entire county to a single municipal court. (*See* J.A. 125)

elections under the interim plan. The interim plan divided the County into a combination of single-member and multi-member districts, including two compact and contiguous single-member, Latino-majority districts. (J.A. 137) On March 6, 1995, the Department of Justice precleared the interim plan, and the judicial elections proceeded on June 6, 1995. (See J.A. 165)

On September 28, 1995, the court held a status conference to discuss the County's progress in developing a permanent plan, at which time the County and appellants requested that the Court extend the terms of the sitting judges, set to expire in December 1996, to afford the County more time to develop a permanent plan. (J.A. 162, 166)^{2/} The court rejected the request. Rather, on November 1, 1995, the court entered an order "modifying" its two prior injunctions against the use of the unprecleared plan to "allow a county-wide election of municipal court judges in the general election in 1996." (J.A. 167) Although the court stated that its plan was "temporary," it ordered that the elected judges would serve a six-year-term. (*Id.*)

In refusing to extend the judicial terms of the sitting judges, the district court wrote:

Miller v. Johnson, 115 S. Ct. 2475 (1995), has cast substantial doubt upon the constitutionality of extending the duration of the previously ordered emergency, interim plan as that plan used race as a significant factor in dividing the County into election areas. . . .

. . . *Miller* raises substantial doubt as to whether legislative division into race-based districts or election areas can ever withstand constitutional scrutiny.

^{2/} At the conference, the State and Judge Sillman urged the court to dismiss the Section 5 proceedings or alternatively to order county-wide elections. (J.A. 166)

(J.A. 167) The district court reached this conclusion without holding any evidentiary hearing, or otherwise creating a record, to address factual issues related to *Miller*; and the court did not make findings concerning the interim plan or analyze its legality under *Miller*.

Nor did the district court disclose the basis for its conclusion in its opinion. Appellees, in opposing probable jurisdiction of this Court, have relied on an off-hand remark of a County attorney to explain the court's ruling. (See State of California Motion to Dismiss or Affirm ("State Motion") at 6; Sillman Motion at 8) In response to the court's inquiry regarding *Miller*'s effect on the interim plan, he had stated:

The reason is that it was an interim remedy to deal with a specific situation. I will be the first one to admit the reasons for the rationale for the boundaries were in fact race generated. There's no question about it. That was the sole motivation. . . .

But I think that it was also necessary in order to resolve a particular problem that we were in at that time. We were looking at, quite frankly, again, looking at what the status quo ante is. Status quo ante is in a multi-district court system that would have had four minority, or four majority-minority districts in it, and this particular plan came up with a program, that was essentially, that had three majority-minority districts.

(Sillman Motion App. 43a) The district court did not refer to these remarks in its decision. Yet, this ambiguous, unexamined statement by an attorney for the County in the course of a status conference is the *only* "evidence" cited by the State in support of the district court's action.

ARGUMENT

I.

THE DISTRICT COURT ERRED BY REFUSING TO EXTEND ITS REMEDIAL INTERIM PLAN THAT AVOIDS RETROGRESSION BY INCLUDING SINGLE-MEMBER MAJORITY-LATINO DISTRICTS

In March 1993, the district court held that Monterey County had violated Section 5 of the Voting Rights Act by failing to obtain preclearance for the ordinances establishing at-large judicial elections. (J.A. 58-59) That ruling remains in place today. To temporarily remedy its violation of Section 5, Monterey County agreed with plaintiffs on the structure of the interim plan, as well as the boundaries of its districts, and the court ordered implementation of that plan for elections held in June 1995. (J.A. 137) This interim plan included single-member districts, two of which are majority-Latino in eligible voter population. The implementation of that plan was a permissible, appropriate remedy for Monterey County's violation of Section 5. The district court erred by refusing to extend it and by imposing an at-large plan that would cause retrogression of Latino voting strength.

Where a violation of the Voting Rights Act has occurred, the Act compels a remedy for racial discrimination in the electoral process that sufficiently redresses the violation found. *See, e.g., Louisiana v. United States*, 380 U.S. 145, 154 (1965) ("the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future"); *Jordan v. Winter*, 604 F. Supp. 807, 814 (N.D. Miss.) (three-judge panel) (remedial plan "must be sufficient to overcome the effects of past discrimination and racial bloc voting and [] provide a fair and equal contest to all voters who may participate in congressional elections"), *aff'd mem. sub nom. Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984).

In remedying a Section 5 violation, a court's obligation—at the very least—is to insure that remedial districts do not cause retrogression of the voting rights of protected minorities. *See McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981); *Beer v. United States*, 425 U.S. 133, 141 (1976) ("The purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."). *See also Statewide Reapportionment Advisory Comm. v. Theodore*, 508 U.S. 968, 968 (1993) (vacating court-ordered plan and remanding "for further consideration in light of the position taken by the Solicitor General," who argued that district court had not adequately considered whether plan complied with Voting Rights Act) (Brief of Solicitor General at 12-14); *Brooks v. Winter*, 461 U.S. 921, 921 (1983) (vacating court-ordered plan, implemented to remedy Section 5 violation, and remanding for consideration under amended Section 2 of Voting Rights Act).

To the extent necessary to remedy a violation of the Voting Rights Act, including the violation of Section 5, a district court may create majority-minority districts. *See Jordan*, 604 F. Supp. at 814-15 (creating a majority-black district to insure that court-ordered plan, implemented to remedy violation of Section 5, would not unlawfully dilute minority vote); *see also Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) (federal courts may order creation of majority-minority districts if "necessary to remedy a violation of federal law"), *on remand*, 857 F. Supp. 579 (N.D. Ohio 1994) (three-judge panel), *app. pending*, 64 U.S.L.W. 3238 (1995). These districts are a vital means of insuring that an electoral plan does not cause retrogression of minority voting strength and of ensuring that minority voters have an equal opportunity to elect their candidate of choice. *See Voinovich*, 507 U.S. at 154-55.

Further, where a court is called on to impose an electoral plan—whether due to a violation of the Voting Rights Act or otherwise—the preferred remedy is to impose a single-member district voting scheme and not an at-large one. As the Court wrote in *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (citations omitted): "[A] court-drawn plan should prefer single-member districts over

multimember districts, absent persuasive justification to the contrary. We have repeatedly reaffirmed this remedial principle." *See also Chapman v. Meier*, 420 U.S. 1, 26-27 (1975) ("unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts"). The Court's preference for single-member districts reflects its concern that "multimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities" *Connor v. Finch*, 431 U.S. 407, 415 (1977); *see Thornburg v. Gingles*, 478 U.S. 30, 47-48 (1986) ("This Court has long recognized that multimember districts and at-large schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'" (citations omitted); *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) ("Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the County as a whole. [An at-large plan] could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.").

The district court erred when it rejected the extension of the interim plan simply because it included majority-Latino districts. The interim plan provided single-member districts to protect the voting rights of the County's Latino minority, while also retaining a majority-white, multimember voting district. The plan was therefore consistent with this Court's doctrine that remedial plans should include single-member districts that will insure that the votes of minorities are not submerged by those of the majority. *See Wise*, 437 U.S. at 540; *Connor*, 431 U.S. at 415.

The interim plan's creation of single-member districts that included compact and contiguous majority-Latino districts (J.A. 137) was a considered remedy for Monterey County's violation of Section 5. The voting scheme in place on November 1, 1968—before passage of the unprecleared ordinances—was a district-based scheme. As a result, and particularly in light of the residential concentration of Latinos in Monterey County (J.S. App. 95), any subsequent at-large scheme was likely to cause

retrogression of Latino voting strength. Appellants and the County even had stipulated that, if single-member districts were drawn for the municipal court, "at least two geographically compact districts can be created each consisting of more than 50% Latino voter eligible population." (J.S. App. 95)

Further, the Court was entitled—if not required—to rely on the County's stipulation that it was unable to prove that an at-large scheme would not cause retrogression of the voting strength of Latino voters. Indeed, initially the district court had expressed its own appropriate "reluctan[ce] to consider a single district, county-wide election plan . . . in light of the *supported* stipulation that such a plan would be retrogressive in terms of Latino voting strength." (J.A. 130 n.4 (emphasis added)) In fact, the panel of Special Masters that most recently had created a plan for state Assembly districts had divided Monterey County between two districts *only* to avoid retrogression and dilution of Latino voting strength. *See Wilson v. Eu*, 1 Cal. 4th 707, 772, 823 P.2d 545, 582 (Special Masters Report), *adopted, id.* at 729-30, 823 P.2d at 559-60 (Cal. 1992). A challenge to the Special Masters' plan brought by white voters under the doctrine of *Shaw v. Reno*, 113 S. Ct. 2816 (1993) was rejected in *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), and this Court summarily affirmed that decision, 115 S. Ct. 2637 (1995).

The district court here was correct in its initial conclusion that the creation of majority-Latino districts was necessary to prevent retrogression, and its implementation of the interim plan was an appropriate remedy for the County's violation of Section 5. When, on November 1, 1995, the district court revised its initial order and failed to order the implementation of a remedial plan with single-member districts, including majority-Latino districts, it ignored this Court's settled, well-reasoned authority and committed reversible error.

This Court should re-affirm that, where called upon to create remedial election plans, courts generally should create district-based plans, which may include majority-minority districts if necessary to avoid retrogression and dilution of minority voting

strength. Absent such plans, courts would be unable to remedy Section 5 violations, and their "remedies" would merely perpetuate unlawful voting plans. The creation of district-based plans with properly drawn, majority-minority districts works toward fulfilling the Voting Rights Act's promise to protect the ability of minority voters to elect representatives of their choice. To fail to do so, in the face of a violation of the Voting Rights Act, subverts the Act.

II.

THE DISTRICT COURT ERRONEOUSLY READ MILLER V. JOHNSON AS JUSTIFYING ITS DEPARTURE FROM THE PREFERRED REMEDY OF A NON-RETROGRESSIVE PLAN THAT INCLUDES SINGLE-MEMBER DISTRICTS

To restore the at-large election plan and to reject the County's and appellant's request that it extend the interim plan, the district court relied on an erroneous interpretation of this Court's decision in *Miller v. Johnson*, 115 S. Ct. 2475 (1995). The court below was wrong when it wrote that *Miller* "cast doubt upon the constitutionality of extending the duration of the previously ordered emergency, interim plan" and when it suggested that the *Miller* doctrine was "persuasive justification" for departing from the settled remedial standard. (J.A. 167)

In *Miller*, this Court held that, to subject a districting plan to strict scrutiny under the Constitution's Equal Protection Clause, a plaintiff must establish that race was the "predominant" and "overriding" factor in the plan's creation, 115 S. Ct. at 2488-89, by proving that "the legislature subordinated traditional race-neutral districting principles, including compactness, respect for political subdivisions or communities defined by actual shared interests to racial considerations." *Id.* at 2488. As Justice O'Connor observed in *Miller*, "the threshold standard that the Court adopts . . . [is] a demanding one," requiring strict scrutiny of a race-conscious plan only where a jurisdiction has "relied on race in substantial disregard of customary and traditional districting practices." *Id.* at 2497. The *Miller* standard is thus limited to "extreme instances of

gerrymandering." *Id.* Further, under *Miller*, once strict scrutiny is invoked, a district court still should uphold a plan if it is narrowly tailored to serve a compelling state interest. *Id.* at 2490.

There is no basis for the district court's view that *Miller* "raises substantial doubt as to whether legislative division into race-based districts or election areas can ever withstand constitutional scrutiny." (J.A. 167) *Miller* makes clear that even district plans subject to strict scrutiny can survive that review. *Miller*, 115 S. Ct. at 2490-91; see also *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (rejecting the notion that strict scrutiny is "strict in theory, but fatal in fact"); *Shaw v. Reno*, 113 S. Ct. 2816, 2828 (1993) (reserving the question whether "the intentional creation of majority-majority districts, without more, always gives rise to an equal protection claim").

King v. State Board of Elections, 1996 WL 13049 (N.D. Ill.) (three-judge court), is on point. In *King*, the court ruled that Illinois' judicially-created congressional redistricting plan that created a majority-Hispanic district (see *Hastert v. State Bd. of Elecs.*, 777 F. Supp. 634, (1991)) did not violate the Equal Protection Clause. Although the *King* Court found that race was the predominant factor in creating that court-ordered plan and that the plan was subject to strict scrutiny under *Miller*, the court upheld the creation of the majority-Hispanic district (and the plan) because it was narrowly tailored to serve a compelling state interest—remedying a Section 2 violation. *Id.* at *26, *27-28. The court stated: "Where a violation of the Voting Rights Act has been established, a race-based remedy may be appropriate. . . . This compelling interest extends to remedying past or present violations of federal statutes intended to eliminate discrimination." *Id.* at *26.

Further, *Miller* explicitly holds that race-consciousness alone in districting is not sufficient to subject a plan to strict scrutiny review. The *Miller* Court wrote: "Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process." 115 S. Ct. at 2488. Here, the district court stated only that race was a "significant factor" in establishing the interim plan.

(J.A. 167) The court thus *did not* find that race was the “predominant” factor in the plan, nor even attempt to determine whether the interim plan “subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to race.” *Miller*, 115 S. Ct. at 2488.

This Court’s summary affirmance of *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413–14 (E.D. Cal. 1994), *aff’d*, 115 S. Ct. 2637 (1995), confirms that the district court misread *Miller*. In *DeWitt*, a three-judge district court held that California’s congressional and legislative redistricting, which included majority-minority districts, was not subject to strict scrutiny under *Shaw v. Reno*, 113 S. Ct. 2816, 2826 (1993). See *DeWitt*, 856 F. Supp. at 1413–14. The *DeWitt* court reasoned that the challenged redistricting act was not subject to strict scrutiny because

[t]he Masters, did not draw district lines based deliberately and solely on race, with arbitrary distortions of district boundaries. The Masters in formulating the redistricting plan, properly looked at race, not as the sole criteria in drawing lines but as one of the many factors to be considered . . . one of which was the consideration of the application of the Voting Rights Act’s objective of assuring that minority voters are not denied the chance effectively to influence the political process.

Id. at 1413–14. As in *DeWitt*, the court’s finding here that race was a “significant” factor in drawing the interim plan did not provide a basis for strict scrutiny review of that plan.⁶⁷

⁶⁷ Indeed, concurring in *Miller*, 115 S. Ct. at 2497, Justice O’Connor emphasized that “[a]pplication of the Court’s standard does not throw into doubt the vast majority of the Nation’s 435 congressional districts . . . even though race may well have been considered in the redistricting process.” Surely, Justice O’Connor’s admonition was not intended to exclude from its reach each of the some 60 majority-minority congressional districts in place at that time. (continued...)

Finally, *Miller* makes clear that intensive factual inquiry is necessary to resolve the questions of whether strict scrutiny applies and, if so, whether a districting plan can nevertheless withstand that review. The district court here compounded its error when it used *Miller* as a justification for its refusal to extend the interim districting plan without holding any evidentiary hearing to investigate the factual issues. The court concluded that “race was a significant factor” even though no party had presented evidence concerning the considerations that went into drawing the interim plan, including evidence concerning compactness, the division of political subdivisions, communities of interest, contiguity, or other principles that Monterey County and California may have traditionally considered in drawing districts.

According to appellees, the court’s conclusion was appropriate in light of the off-the-cuff description of the districting plan made by counsel for the County at the court’s status conference held on September 28, 1995. (See p. 7 *supra*) But, the court did not even credit that statement in its decision.²⁷ Moreover, the statement—which was taken out of context and reflected only the fact that the interim plan was a remedy for the County’s violation of Section 5—was not sufficient to carry a plaintiff’s burden under *Miller*. Nor does it substitute for what should have been appellants’ right to establish *by evidence* that “race-neutral considerations” were not subordinated to the consideration of race in the creation of the interim plan or that the plan also would survive strict scrutiny.

⁶⁷ (...continued)
sional districts in place at that time.

²⁷ The court’s reliance on the County attorney’s remark would have been at odds with the its refusal to credit the County’s considered *stipulation* that it could not show that the at-large, county-wide election of judges in Monterey County “did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County.” (Sillman Motion App. 43a; see J.A. at 126)

In drawing the hasty conclusion that *Miller* precludes Monterey County's continued use of the interim plan, the district court misread *Miller* as a sweeping indictment of the creation of majority-minority districts. This view would not only cripple judicial authority to create lawful majority-minority districts consistent with the state's traditional districting practices but also would render meaningless *Miller*'s holding that even districts drawn predominantly on the basis of race are lawful if narrowly tailored to serve a compelling state interest. *Miller* does not command this result.

III.

THE DISTRICT COURT ERRED BY CONCLUDING THAT CALIFORNIA LAW PROVIDED SUFFICIENT JUSTIFICATION FOR IT TO ALLOW IMPLEMENTATION OF AN AT-LARGE PLAN

Finally, the district court erroneously deferred to California state law and policy in refusing to extend the interim plan or to otherwise implement a remedial district-based plan. The court's ruling disavowed longstanding principles that govern the involvement of federal courts in the establishment and oversight of local districting plans.

As previously discussed, this Court has held that, in putting in place remedial plans, "single-member districts are to be preferred in court-ordered legislative plans unless the Court can articulate a 'singular combination of unique factors' that justifies a different result." *Connor v. Finch*, 431 U.S. 407, 414-15 (1977) (citing *Mahon v. Howell*, 410 U.S. 315 (1973)). In *Connor*, this Court explicitly rejected adherence to local jurisdictional policies against splitting jurisdictional lines in districting as a sufficient reason "to overcome the strong preference for single-member districting" in court-ordered plans. *Id.* at 415. The *Connor* Court further held "that the latitude in court-ordered plans for departure from the [federal] standard in order to maintain county lines is considerably narrower than that afforded apportionments devised by state legislatures, and that the burden of articulating special reasons

for following such a policy . . . is correspondingly higher." *Id.* at 419-20; see also *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693-94 (1979) (state laws may be set aside to vindicate federal rights).

The remedial powers of the federal courts under the Voting Rights Act are not limited merely because a remedy may conflict with provisions of state law. When state law provisions can be accommodated in a remedial plan while also curing the violation of federal law, such accommodation generally is required. See *Upham v. Seamon*, 456 U.S. 37, 43 (1982). However, where adherence to state law provisions would prevent adoption of an effective remedy for a federally secured right, deference to state law is unwarranted. See *Connor*, 431 U.S. at 415.

The court here failed to articulate any persuasive features of Monterey County or California state policy that would justify adoption of an at-large voting scheme for the election of judges, particularly where the County itself has stipulated that it could not prove that such a scheme would not cause retrogression of minority voting strength. The California Constitution sets certain redistricting requirements, including "respect" for the "geographical integrity of any city, county, or city and county . . . to the extent possible" Cal. Const. Art. XXI, § 1. This is not a strong state policy. Indeed, the state Constitution provides an exception for the City and County of San Diego, which "may be divided into more than one municipal court district," *id.* Art. VI, § 5(d), and the Supreme Court of the State of California has upheld the drawing of election districts across city lines, where such districts were necessary to comply with federal voting rights law and policy. See *Wilson v. Eu*, 1 Cal. 4th 707, 762, 823 P.2d 545, 575 (Special Masters Report), *adopted, id.* at 729-30, 823 P.2d at 559-60 (Cal. 1992); see also *DeWitt*, 856 F. Supp. at 1415 (rejecting a *Shaw* challenge to California's districting plan adopted in *Wilson*).

The court here erred in doubting whether the interim plan was legally enforceable "because it suspended otherwise applicable provisions of state law . . ." (J.A. 172) This Court should reverse the court's order, with instructions to accommodate state law,

where possible, but not at the expense of enforcing the federal mandate of the Voting Rights Act and the Constitution.

CONCLUSION

The decision of the three-judge district court to allow Monterey County to implement an unprecleared, at-large election plan should be reversed and remanded with appropriate guidance to assure that the district court fulfills its remedial obligations to implement a non-retrogressive plan. The court below failed to do so based on its erroneous interpretation of *Miller v. Johnson*, 115 S. Ct. 2475 (1995), and its unwarranted deference to state law. Accordingly, this Court should instruct the district court and other lower courts on their obligations to design remedial plans that comport with the Voting Rights Act and that include majority-minority districts, where necessary to avoid retrogression or dilution of a minority group's voting strength. Neither *Miller* nor state law are or should be obstacles to such appropriate relief, which is critical to the enforcement of the Voting Rights Act and the Constitution.

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